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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JOSEPH PITTMAN, JR., DIANA ) Civil No. 09-CV-1952-WQH(WVG)  
PITTMAN, )  
Plaintiffs, ) ORDER GRANTING DEFENDANT'S  
v. ) MOTION FOR RECONSIDERATION  
COUNTY OF SAN DIEGO, ) (DOC. 26) OF ORDER TO PRODUCE  
Defendant. ) PORTIONS OF INTERNAL FILES  
                                  ) (DOC. 23)  
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Pending before the Court is defendant, County of San Diego's ("County"), motion for reconsideration (Doc. No. 26) of the Court's order compelling production of documents (Doc. No. 23). Specifically, the County objects to the Court's determination that documents bearing Bates numbers Sheriff 0001832-0001845 and Sheriff 0001851-0001870 are not protected by the attorney-client privilege or work-product doctrine. After considering new facts the County presented for the first time here, the Court GRANTS the motion.

I. FACTUAL SUMMARY

County Counsel is charged with representing the County and its various subdivisions and departments in all legal affairs.

1 County Counsel's role includes primary responsibility for investigating administrative claims for damages against the County.

3 Plaintiffs in this case tendered a claim that arose from  
4 their confrontation with San Diego Sheriff Deputies on the evening  
5 of October 19, 2008. County Counsel received and handled the  
6 evaluation and disposition of the claim.

7 On February 20, 2009, a non-attorney, Mary Ann Wiggs of the  
8 County Counsel's Claims Division, sent the Sheriff's Department a  
9 request for the Sheriff's "comments" on the claim. (Bates Nos.  
10 Sheriff 001844-45.) The letter advised the Sheriff to mark his  
11 response as "Attorney Client Communication" and advised that  
12 "[a]ny investigative efforts you now take and your analysis of the  
13 facts are in anticipation of litigation." (Id.)

14 On February 25, 2009, Lieutenant Margaret Sanfilippo of the  
15 Sheriff's Division of Inspectional Services forwarded the request  
16 to the Commander and Captain in charge of the Sheriff's Lemon  
17 Grove substation for their "recommendation regarding settlement."  
18 (Bates No. Sheriff 001843.)

19 On March 19, 2009, the Sergeant assigned to review the  
20 matter and make a recommendation completed and submitted a highly  
21 detailed report that included the Sergeant's evaluation of the  
22 underlying incident and recommendation regarding the outcome of  
23 the plaintiffs' claim. (Bates Nos. Sheriff 001840-42, Sheriff  
24 001851-71.)

25 On March 24, 2009, Lieutenant Sanfilippo wrote Ms. Wiggs  
26 and made a recommendation regarding the Pittmans' claim. (Bates  
27 No. Sheriff 001835.)

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1 On March 30, 2009, Ms. Wiggs sent an e-mail requesting  
2 Joseph Pittman's full medical records on a compact disc. (Bates  
3 No. Sheriff 001833.)

4 On April 1, 2009, Lieutenant Sanfilippo forwarded Ms.  
5 Wiggs's request to the Sheriff's Medical Services Division.  
6 (Bates No. Sheriff 001832.)

On April 14, 2009, a Sheriff's Detentions Supervising Nurse prepared a very superficial report of Mr. Pittman's medical treatment in jail. (Bates Nos. Sheriff 001836-39.)

On April 15, 2009, the Division of Inspectional Services forwarded the medical report to Ms. Wiggs. (Bates No. Sheriff 001834.)

13 The lead or title document in each submission was marked  
14 either "Confidential," "Attorney Client Confidential," or "Attor-  
15 ney Client Communication."

## **II. LEGAL STANDARD**

**A. Motions For Reconsideration**

The Court has discretion to reconsider interlocutory orders at any time prior to final judgment. Hydranautics v. Filmtec Corp., 306 F. Supp. 2d 958, 968 (S.D. Cal. 2003); Washington v. Garcia, 977 F. Supp. 1067, 1069 (S.D. Cal. 1997); Cal. v. Summer Del Caribe, Inc., 821 F. Supp. 574, 577 (N.D. Cal. 1993) (citations omitted). "Such motions may be justified on the basis of an intervening change in the law, or the need to correct a clear error or prevent manifest injustice." Cal., 821 F. Supp. at 577 (citing Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 369 n.5 (9th Cir. 1989)). "To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convinc-

1 ing nature to induce the court to reverse its prior decision."  
 2 Id. (citations omitted).

3 As the Fifth Circuit explained, "the trial court is free to  
 4 reconsider and reverse its decision for any reason it deems  
 5 sufficient, even in the absence of new evidence or an intervening  
 6 change in or clarification of the substantive law." McKethan v.  
 7 Tex. Farm Bureau, 996 F.2d 734, 738 n.6 (5th Cir. 1993) (quoting  
 8 Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185  
 9 (5th Cir. 1990)). Ultimately, the decision on a motion for  
 10 reconsideration lies in the Court's sound discretion. Navajo  
 11 Nation v. Norris, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing Kona  
 12 Enters. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000)).

13 **B. Work-Product Doctrine**

14 The so-called work-product doctrine, as embodied in Federal  
 15 Rule of Civil Procedure 26(b)(3), broadly applies to documents  
 16 prepared by the "parties' attorney, consultant, surety,  
 17 indemnitor, insurer, or agent." Fed. R. Civ. P. 26(b)(3)(A).

18 In order to qualify for work-product protection, the  
 19 asserting party must show that the withheld materials are: (1)  
 20 documents or tangible things; (2) prepared in anticipation of  
 21 litigation or for trial; and (3) the documents or tangible things  
 22 were prepared by or for the party or the attorney asserting the  
 23 privilege. See id.; In re Cal. Pub. Util. Comm'n, 892 F.2d 778,  
 24 780-81 (9th Cir. 1989).

25 "At its core, the work-product doctrine shelters the mental  
 26 processes of the attorney, providing a privileged area within  
 27 which he can analyze and prepare his client's case. But the  
 28 doctrine is an intensely practical one, grounded in the realities

1 of litigation in our adversary system. One of those realities is  
2 that attorneys often must rely on the assistance of investigators  
3 and other agents in the compilation of materials in preparation  
4 for trial. It is therefore necessary that the doctrine protect  
5 material prepared by agents for the attorney as well as those  
6 prepared by the attorney himself." United States v. Nobles, 422  
7 U.S. 225, 238-39 (1975); see also In re Grand Jury Subpoena, 350  
8 F.3d 1010, 1015 (9th Cir. 2003).

9 Nevertheless, the protection afforded by the doctrine is  
10 qualified and may be overcome if the party seeking disclosure  
11 shows that the materials are otherwise discoverable under Rule  
12 26(b)(1) and that "it has substantial need for the materials to  
13 prepare its case and cannot, without undue hardship, obtain their  
14 substantial equivalent by other means." Fed. R. Civ. P.  
15 26(b)(3)(A)(i)-(ii).

16 C. **Attorney-Client Privilege**

17 The attorney-client privilege "exists to protect not only  
18 the giving of professional advice to those who can act on it but  
19 also giving of information to the lawyer to enable him to give  
20 sound and informed advice." Upjohn v. United States, 449 U.S.  
21 383, 390 (1981). Courts have found that investigation is impor-  
22 tant part of an attorney's legal services to a client. United  
23 States v. Rowe, 96 F.3d 1294, 1296-97 (9th Cir. 1996).

24 "[A] party asserting the attorney-client privilege has the  
25 burden of establishing the [existence of an attorney-client]  
26 relationship and the privileged nature of the communication."  
27 United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (quot-  
28 ing United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997)).

1 An eight-part test determines whether information is covered by  
2 the attorney-client privilege:

3 1) Where legal advice of any kind is sought (2) from a  
4 professional legal adviser in his capacity as such,  
5 (3) the communications relating to that purpose, (4)  
made in confidence (5) by the client, (6) are at his  
instance permanently protected (7) from disclosure by  
himself or by the legal adviser, (8) unless the pro-  
tection be waived.

7 Id. (quoting In re Grand Jury Investigation, 974 F.2d 1068, 1071  
8 n.2 (9th Cir. 1992)).

9 **II. DISCUSSION**

10 **A. The Court Accepts The New Facts Presented For the First**  
**Time in the Reconsideration Motion**

12 Although the County presented facts in support of its  
13 privilege and work-product doctrine claims for the first time in  
14 its motion for reconsideration, the Court exercises its discretion  
15 to consider those facts in the interest of judicial economy and in  
16 light of the importance of the issues.

17 **B. Work-Product Doctrine**

18 All of the documents under reconsideration in some way  
19 relate to Plaintiffs' pre-litigation claim tender and County  
20 Counsel's request for the Sheriff's evaluation and input. How-  
21 ever, the Court evaluates only the ultimate products of County  
22 Counsel's requests, the Sergeant's report (Bates Nos. Sheriff  
23 001840-42, Sheriff 001851-71) and Medical Services Division report  
24 (Bates Nos. Sheriff 001836-39), under the work-product doctrine.  
25 The remaining document pages (Bates Nos. Sheriff 001832-35,  
26 001843-45) are more aptly categorized as "communications" and will  
27 be evaluated under the attorney-client privilege doctrine.

28 / / /

1           **1. The Reports Were Created Under Counsel's Direction**

2           Based on the County's explanation of the chain of communications that led to the reports' creation, it is clear that both  
3 reports were prepared at the request and direction of the County's  
4 attorney. The Court next turns to whether the reports above were  
5 prepared "in anticipation of litigation."

6           **2. The Reports Were Made In Anticipation of Litigation**

7           Because the reports at issue were prepared before litigation and during the claim tender phase, the Court must decide  
8 whether reports prepared to accept or deny a claim are prepared  
9 "in anticipation of litigation." Based on the facts of this case,  
10 the Court finds that the reports were so generated.

11           Central to the work-product doctrine is the requirement  
12 that the documents under its umbrella be "prepared in anticipation  
13 of litigation." Fed. R. Civ. P. 26(b)(3)(A). Under Ninth Circuit  
14 law, a document meets this requirement if it was prepared "because  
15 of the prospect of litigation." In re Grand Jury Subpoena, 357  
16 F.3d 900, 908 (9th Cir. 2003) (emphasis added). A document  
17 satisfies Rule 26(b)(3) under this standard if, under the totality  
18 of circumstances, "it can fairly be said that the 'document was  
19 created because of anticipated litigation, and would not have been  
20 created in substantially similar form but for the prospect of that  
21 litigation[.]'" Id. at 908 (quoting United States v. Adlman, 134  
22 F.3d 1194 (2d Cir. 1998)). While it is true that not every claim  
23 against the County will result in a lawsuit, "the fact that [a  
24 party] conducts an investigation into claims against [it] . . . as  
25 a matter of routine does not necessarily mean that the investiga-  
26 tion is not being conducted in anticipation of litigation, if  
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1 other factors are present." Garcia v. City of Imperial, \_\_\_\_  
2 F.R.D. \_\_\_, 2010 WL 306289 at \*4 (S.D. Cal. Aug. 2, 2010) (citing  
3 Spaulding v. Denton, 68 F.R.D. 342, 345 (D. Del. 1975); 6 Moore's  
4 Federal Practice - Civil at ¶ 26.70[3][a] (Matthew Bender 3d ed.).

5 On February 9, 2009, the Pittmans' attorney submitted a  
6 claim notice to the County in the form of a letter. (Motion,  
7 Exhibit A.) The Pittmans' notice included their detailed version  
8 of events and concluded as follows: "The amount of this claim for  
9 each of the Claimants individually exceeds ten thousand dollars  
10 (\$10,000) and when it is filed in court it will be filed as an  
11 unlimited case seeking in excess of \$1,000,000." (Exhibit A at 5  
12 (emphasis added). The Court finds notable the letter's use of  
13 "when," which essentially put the County on notice that the  
14 Pittmans would file a lawsuit if their claim was denied, instead  
15 of "if," which would have made the prospects of future litigation  
16 much less certain. Thus, at the time County Counsel sought the  
17 Sheriff's investigation and evaluation of the allegations and  
18 claim, the County reasonably anticipated that the Pittmans would  
19 file a lawsuit seeking more than \$1,000,000 if their claim was  
20 denied--the Pittmans warned the County as much from the beginning.

21 In light of the Pittmans' letter, County Counsel's request  
22 to the Sheriff served a dual purpose. It simultaneously sought  
23 the Sheriff's opinion on the active claim and requested that the  
24 Sheriff "help the County Counsel assess the County's civil liability."  
25 (Motion at 11:1.) It is not relevant that an active  
26 lawsuit was not pending when the reports were made, as it is  
27 sufficient that litigation was reasonably anticipated under the  
28 totality of the circumstances. In re Grand Jury Subpoena, 357

1 F.3d 900, 908 (9th Cir. 2003). The Court finds that the reports  
2 were created in anticipation of litigation.

3 The Court further finds that the reports would not have  
4 been created in substantially similar form but for the prospect of  
5 litigation. The Pittmans assert that the reports were created  
6 during the ordinary course of business. However, Lieutenant  
7 Sanfilippo declares that the Department of Inspectional Services  
8 "would not initiate such an internal review and investigation  
9 without a request from County Counsel." (Sanfilippo Decl. at  
10 ¶ 6.) In other words, claim and litigation reviews and recommen-  
11 dations are not part of the Sheriff's daily operations, as County  
12 Counsel, not the Sheriff, has primary responsibility for handling  
13 claims and litigation. Cf. Miller v. Pancucci, 141 F.R.D. 292,  
14 303 (C.D. Cal. 1992) (finding that a report was created during the  
15 course of a police department's business because the internal  
16 affairs unit had been established partly with the purpose of  
17 investigating tort claims).

18 The same is true for the Medical Services Division's  
19 report, which bears the claim number and is essentially a bare-  
20 bones summary of Mr. Pittman's routine, post-booking medical  
21 processing, and which was derived from documents created at the  
22 time of his processing. The Medical Services Division has no  
23 other reason to create such reports during the course of its daily  
24 business.

25 **3. The Reports Were Created By County Counsel's Agents**

26 Further, it is not relevant that the reports were not  
27 prepared by County Counsel, but were prepared for County Counsel.  
28 The Sheriff Sergeant and Supervising Nurse were both employees and

1 agents of the Sheriff's Department, a division of the County, and  
2 were employees and agents of the County as a result. As such, the  
3 reports were prepared by the County's employees and are eligible  
4 for the doctrine's protection. See Fed. R. Civ. P. 26(b)(3)(A)  
5 ("Ordinarily, a party may not discover documents and tangible  
6 things . . . by or for another party or its representative (in-  
7 cluding the other party's attorney, consultant, . . . or agent)." )  
8 (emphasis added); Canel v. Lincoln Nat'l Bank, 179 F.R.D. 224, 227  
9 (N.D. Ill. 1998) (memorandum prepared by bank officer analyzing  
10 legal, factual, and financial issues raised by minority share-  
11 holder suit was entitled to work product protection).

12 The Court recognizes that it previously found that these  
13 reports were not protected based on its then assessment that they  
14 were prepared in the course of the Sheriff's operations. However,  
15 the Court was not previously privy to the sequence of communica-  
16 tions and requests that led to their creation. When viewed alone  
17 and without context, it is not self-evident that these documents  
18 were created at County Counsel's request and outside the course of  
19 the Sheriff's daily operations. Without proper context, these  
20 reports originally appeared to be prepared within, and for, the  
21 Sheriff's Department, as County Counsel's name does not appear on  
22 any of them. However, with the benefit of additional information  
23 and the proper context, it is evident that these reports were  
24 generated during the course of legal representation and are  
25 attorney work product.

26       **4. Plaintiffs Make No Showing Of Undue Hardship**

27       While it is true that work-product doctrine is not abso-  
28 lute, the plaintiffs have made no showing whatsoever of undue

1 hardship or substantial need, as their pleadings simply do not  
2 address the issue. See Fed. R. Civ. P. 26(b)(3)(A)(ii); Admiral  
3 Ins. Co. v. United States District Court, 881 F.2d 1486, 1494 (9th  
4 Cir. 1989) ("The primary purpose of the work product rule is to  
5 'prevent exploitation of a party's efforts in preparing for  
6 litigation.'"). All of the information in the reports is equally  
7 available to the Pittmans, whether from the original arrest  
8 reports, medical reports, or through witness depositions. The  
9 reports contain no facts that are unique to them and which cannot  
10 be obtained during the ordinary course of litigation and discov-  
11 ery.

12 The reports here are distinguishable from arrest reports  
13 and medical records that are ordinarily prepared at or near the  
14 time of an incident. In general, the work-product doctrine does  
15 not protect contemporaneously-prepared police reports or reports  
16 that document the patient's then-existing ailments, diagnosis, and  
17 treatment, as they were prepared at the time of injury when the  
18 prospect of litigation was completely unknown. However, when  
19 these reports are prepared months after the underlying incident,  
20 after a claim has been filed, and after counsel has requested  
21 them, they serve a different purpose. They no longer document  
22 facts for the sake of documentation but rather review, evaluate,  
23 and summarize facts and source reports with the ultimate purpose  
24 of helping develop legal strategy.

25 **B. Attorney-Client Privilege**

26 Based on the reasons below, the Court next finds that  
27 documents bearing Bates numbers Sheriff 001832-35 and Sheriff  
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1 001843-45 satisfy the attorney-client privilege's elements and are  
2 absolutely protected from disclosure.

3 First, the communications were made during the course of  
4 County Counsel's request for the client's input on how a claim  
5 should be handled. This qualifies as "legal advice of any kind."

6 Next, the County Counsel was acting as the County's legal  
7 advisor and the communications were made in County Counsel's  
8 capacity as such; the Sheriff is part of the County. And although  
9 Ms. Wiggs was not herself an attorney, she was acting in her  
10 capacity as a County Counsel employee. See United States v.  
11 Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

12 Next, the communications were made in confidence. Each  
13 communication is marked as confidential and there was full expect-  
14 expectation that the communications would be kept confidential.

15 Next, the client, the County, is now insisting that the  
16 documents be kept confidential and from being disclosed.

17 Finally, there is no indication that the attorney-client  
18 privilege was waived by disclosure to third parties or in any  
19 other way.

20 **V. CONCLUSION**

21 Based on the foregoing, the Court GRANTS the County's  
22 motion for reconsideration and finds as follows:

23 (1) The document pages numbered Sheriff 001840-42, Sheriff  
24 001851-71, and 001836-39 are protected from disclosure by the  
25 attorney work-product doctrine;<sup>1/</sup> and

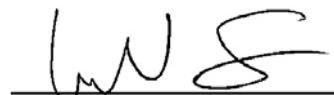
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26 <sup>1/</sup>  
27 The Court is careful to note that while the work-product doctrine prevents  
28 the production of the reports themselves, the facts and witness identities  
within the reports are not protected if they are independently responsive  
to discovery requests and are themselves not independently privileged from  
disclosure.

1                   (2) The document pages bearing Bates numbers Sheriff  
2 001832-35 and Sheriff 001843-45 are absolutely protected from  
3 disclosure by the attorney-client privilege.

4 IT IS SO ORDERED.

5 DATED: November 3, 2010

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8                   Hon. William V. Gallo  
9                   U.S. Magistrate Judge  
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